Supreme Court, U.S.
FILED
MAR 9 1994
OFFICE OF THE CLERK

No. 93-1106

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

EDMOND JACKSON,

Petitioner,

- against -

POLICE DEPARTMENT OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK AND ESTATE OF HAROLD CANNON BY HIS ADMINISTRATRIX AUDREY M. CANNON,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

PAUL A. CROTTY,
Corporation Counsel of the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, N.Y. 10007.
(212) 788-1040 or 1072

LEONARD J. KOERNER,*
KRISTIN M. HELMERS,
WILLIAM J. THOM,
of Counsel.

*Attorney of Record

March 9, 1994

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Under the facts of this case, would a reasonable police officer have known that a defendant's clearly established constitutional rights had been violated by an inadvertent show-up when the state trial court, the state intermediate appellate court and the state's highest court all found that defendant's claim of a constitutional violation was without merit?

TABLE OF CONTENTS

Page

COUNTER STATEMENT OF THE QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 6

REASON FOR DENYING THE WRIT 7

BECAUSE POLICE OFFICER CANNON DID NOT VIOLATE ANY CLEARLY ESTABLISHED RIGHT OF WHICH A REASONABLE PERSON WOULD HAVE KNOWN, PETITIONER'S CLAIM AGAINST OFFICER CANNON'S ESTATE WAS PROPERLY DISMISSED.

CONCLUSION 14

TABLE OF AUTHORITIES

Cases: **Page**

Harlow v. Fitzgerald, 457 US 800 (1982) 6, 13

Jackson v. Fogg, 465 F. Supp. 177 (S.D.N.Y., 1978) 4

Jackson v. Fogg, 589 F2d 108 (2d Cir., 1978) . . . 4

Jackson v. NYPD, 192 AD2d 641, 596 NYS2d 457 (2d Dept., 1993) 5

Jackson v. NYPD, 82 NY2d 658, 604 NYS2d 556 (1993) 5

People v. Jackson, 40 AD2d 1081, 337 NYS2d 1005 (2d Dept., 1972), aff'd 35 NY2d 856, 363 NYS2d 580, 322 NE2d 272 (1974) 3

Stovall v. Denno, 388 US 293 (1967) 8, 10

No. 93-1106

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

EDMOND JACKSON,

Petitioner,

- against -

POLICE DEPARTMENT OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK AND ESTATE OF HAROLD CANNON BY HIS ADMINISTRATRIX AUDREY M. CANNON,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

STATEMENT OF THE CASE

On or about July 13, 1970, petitioner was arrested for murder, felony murder, attempted robbery in the first degree and possession of a weapon (10-11).[1] These charges arose out of an attempted robbery at Harvey's Lounge, a bar in Queens County, New York during the

[1] Numbers in parentheses refer to pages in petitioner's appendix.

middle of the night of June 14, 1970 (28). In the course of the robbery, the robber shot a bartender, Harold Dixon, who died 10 days later (28-29). Eyewitnesses of these events included bartender Joseph Webb and customers Mary Phifer, Edward Byrd and Willie Johnson (28).

Petitioner was identified as the perpetrator in two successive lineups by the four eyewitnesses on July 13, 1970 at a stationhouse in Queens (30). However, prior to the lineups, witnesses Webb, Byrd, and Johnson had seen and identified petitioner in the stationhouse (30-34).

Petitioner moved in a Wade hearing to suppress identification testimony (34). The suppression/trial court ruled that the stationhouse and lineup identifications of Webb, Johnson and Byrd

would be suppressed, but that those witnesses could testify that they recognized petitioner from the robbery (37-38). Mary Phifer was permitted to testify that she recognized petitioner from the robbery and that she had identified him at the lineup (37-38).

Petitioner was convicted of murder, felony murder, attempted robbery in the first degree and possession of a weapon (27).

He appealed, and the convictions were affirmed, without opinion, by the Appellate Division, Second Department and by the New York State Court of Appeals (27). People v. Jackson, 40 AD2d 1081, 337 NYS2d 1005 (2d Dept., 1972), aff'd, 35 NY2d 856, 363 NYS2d 580, 322 NE 2d 272 (1974).

In August of 1978, the U.S. District Court for the Southern District of New York granted petitioner's petition for a writ of habeas corpus (27-66). 465 F. Supp. 177 (S.D.N.Y., 1978). That court found that the pre-lineup observations of petitioner by Webb, Byrd and Johnson were suggestive and that those observations tainted not only their lineup identifications but their in-court identifications as well.

The U.S. Court of Appeals for the Second Circuit affirmed (17-26). 589 F2d 108 (2d Cir., 1978).

Subsequently, petitioner sued the respondents for false arrest, illegal imprisonment and conspiracy to deprive petitioner of his civil rights (13-16). Respondents moved for summary judgment, which was granted, and that decision was

affirmed by the Appellate Division, Second Department (8-12, 4-7). 192 AD2d 641, 596 NYS2d 457 (2d Dept., 1993). Leave to appeal to the New York State Court of Appeals was denied (1). 82 NY2d 658, 604 NYS2d 556 (1993)

In his petition for a writ of certiorari, petitioner has abandoned all of his previous claims, except his civil rights claim against the estate of Police Officer Harold Cannon. That claim was dismissed by the trial court based upon the following analysis (11-12):

> Furthermore, defendant Audrey Cannon's decedent, police officer Harold Cannon, was protected from liability under the doctrine of qualified immunity. Under this doctrine, government officials acting in their official capacity are shielded from liability for civil damages if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have

known." (*Harlow v. Fitzgerald*, 457 US 800, 808.) In light of the fact that plaintiff's conviction and the propriety of the officer's actions was unanimously upheld by the state judicial system, this court finds as a matter of law that the officer did not engage in conduct violative of a clearly established right that a reasonable person would have known.

SUMMARY OF ARGUMENT

In order for petitioner to prevail in his claim against the estate of Police Officer Harold Cannon, petitioner had to prove that Officer Cannon violated a clearly established constitutional right of petitioner of which a reasonable person would have known. Petitioner could not do that, and his claim was properly dismissed.

REASON FOR DENYING THE WRIT

BECAUSE POLICE OFFICER CANNON DID NOT VIOLATE ANY CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT OF WHICH A REASONABLE PERSON WOULD HAVE KNOWN, PETITIONER'S CLAIM AGAINST OFFICER CANNON'S ESTATE WAS PROPERLY DISMISSED.

There is no dispute between the parties that the trial court correctly articulated the standard for determining whether the doctrine of qualified immunity applies to the facts of this case, i.e., did Officer Cannon's actions violate a clearly established constitutional right of which a reasonable person would have known? Thus, in order to avoid summary judgment against him, petitioner was obliged to: (1) identify the clearly established constitutional right Officer Cannon

allegedly violated and (2) show that, in July of 1970, a reasonable police officer would have known of the existence of that right. Petitioner has done neither.

In the courts below, petitioner argued that the clearly established constitutional right that Officer Cannon had allegedly violated was established by this Court in its decision in Stovall v. Denno, 388 US 293 (1967).

In Stovall, the petitioner was convicted for murdering one Dr. Behrendt. Petitioner had been arrested the day after the murder and was taken by police officers, to one of whom he was handcuffed, to be viewed at the hospital by Mrs. Behrendt, who had been seriously wounded by her husband's assailant. Mrs. Behrendt identified petitioner as the murderer. At trial, she testified as to

the hospital identification, and she also made an in-court identification of the petitioner. Following affirmance of his conviction by the highest state court, petitioner sought habeas corpus in the U.S. District Court, claiming that Mrs. Behrendt's identification testimony violated his constitutional rights. The District Court dismissed the petition, and the U.S. Court of Appeals affirmed, as did this Court. Since the police behavior in deliberately arranging a show-up identification in Stovall was upheld, it is difficult to understand why petitioner thinks that case articulated some clearly established right which Officer Cannon violated when the inadvertent pre-lineup observations of petitioner by three of the eyewitnesses took place in this case.

Indeed, throughout this litigation, the nature of petitioner's claim against the police has been somewhat unclear. He seems to be claiming that if the police mishandle an investigation resulting in the suppression of damning evidence against a defendant, the defendant is somehow aggrieved. To state the obvious, it is the prosecutor who is aggrieved in that situation.

Petitioner's real grievance in this case is not what the police did; it is what the state courts failed to do, namely suppress the evidence of Webb, Byrd and Johnson.

Even assuming, for the sake of argument, that Stovall established some new constitutional right, the question remains, would a reasonable police officer have been aware of that right?

Petitioner argued the existence and violation of his rights at the suppression hearing, at the Appellate Division and at the New York State Court of Appeals, but not a single one of the judges of those courts subscribed to his argument. If those trained in the law could not discern a violation of petitioner's rights, it could hardly be clear to a lay person.

In his petition for a writ of certiorari, petitioner argues that this case involves issues of federalism, that in dismissing his case the state courts showed insufficient deference to the federal court decisions and that the fact that the district court thought the police grossly negligent should, by itself, preclude summary judgment

(petition pp. 7-11). These arguments are without merit.

There is nothing in the decision to grant summary judgment against petitioner which conflicts with the federal court decisions. There has never been any disagreement that the pre-lineup observations should not have taken place; the only disagreement was how much of the testimony of Webb, Byrd and Johnson should be suppressed because of those observations. However, whether the behavior of the police is properly characterized as grossly negligent, or as something else, does not alter the fact that petitioner, to prevail in this case, had to establish that Officer Cannon violated petitioner's clearly established constitutional rights of which a reasonable person would have known.

The cases cited by petitioner on page 9 of his petition for the proposition that summary judgment is precluded if gross negligence is found do not stand for that proposition. Rather they stand for the proposition that a claim of "ordinary negligence" is insufficient to maintain a 1983 action. Moreover, those cases make clear that the presence of gross negligence does not effect the requirements under this Court's Harlow decision - namely, that petitioner must establish a violation of a clearly established constitutional right of which a reasonable person would have known.

Because the state courts correctly invoked and applied the Harlow standard, there is no genuine issue of law dividing the parties, nor is there any other issue

in this case of nationwide importance justifying review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

PAUL A. CROTTY,
Corporation Counsel of the
City of New York,
Attorney for Respondents.

LEONARD J. KOERNER,*
KRISTIN M. HELMERS,
WILLIAM J. THOM,
of Counsel.

*Attorney of Record